IN THE CIRCUIT COURT OF THE 17TH
JUDICIAL CIRCUIT IN AND FOR
BROWARD COUNTY, FLORIDA

CIVIL DIVISION

CASE NO.: CACE-15-007888 Division 03

[redacted], a minor child, by and through his Next Friend and/or Guardian, DAVID BAZERMAN, ESQ.,

Plaintiff,

vs.

KIDS IN DISTRESS, INC.; CHILDNET, INC.; and MICHAEL MCGUIGAN,

Defendants.
_____/

PLAINTIFF'S REPLY TO DEFENDANT, CHILDNET, INC.'S, ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFF'S COMPLAINT

The Plaintiff, [redacted], a minor child, by and through his next friend and/or guardian, David Bazerman (hereinafter "Plaintiff"), by and through undersigned counsel, pursuant to Rule 1.110(a), Florida Rules of Civil Procedure, files his Reply to Defendant, CHILDNET, INC.'s (hereinafter "Defendant"), Answer and Affirmative Defenses to Plaintiff's Complaint and states:

1. Plaintiff denies Defendant's First Affirmative Defense and further avoids this affirmative defense in that the statement that "this Defendant denies any and all allegations of negligence as raised in the Complaint" is a general denial of negligence and does not constitute an affirmative defense. According to Florida Rule of Civil Procedure 1.110(c), in its answer, a pleader shall state in short and plain terms the pleader's defenses to each claim and shall admit or deny the averments on which the adverse party relies. A party must affirmatively set forth any

matter constituting an avoidance or an affirmative defense. Fla. R. Civ. P. 1.110(d). "An affirmative defense is a defense which admits the cause of action, but avoids liability, in whole or in part, by alleging an excuse, justification, or other matter negating or limiting liability." *St. Paul Mercury Ins. Co. v. Coucher*, 837 So. 2d 483, 487 (Fla. 5th DCA 2002). As such, this defense is denied.

2. Plaintiff denies Defendant's Second Affirmative Defense and further avoids this affirmative defense in that the Defendant fails to set forth sufficient ultimate facts to support the defense that "Plaintiff's claim is barred as this Defendant is an agent of the State and immune from suit pursuant to Florida law." The Defendant's contract clearly states that the Defendant is an independent contractor and not an "agent" of the state, and is therefore not entitled to the protections of section 768.28. Furthermore, the protections which apply to state entities do not extend to its contracted community-based providers and this Defendant is not entitled to the immunities and privileges found in § 768.28, Fla. Stat. Section 409.1671, Florida Statutes, now found in section 409.993, Florida Statutes, sets forth its own statutory scheme for protections and limits of community-based providers such as the Defendant and specifically addresses the issue of liability, making it clear that the Defendant is not an agent of the state. To the extent this defense is duplicative of Defendant's Third and Sixteenth Affirmative Defenses, this defense is denied.

3. Plaintiff denies Defendant's Third Affirmative Defense and further avoids this affirmative defense in that the Defendant fails to set forth sufficient ultimate facts to support the defense that "the Plaintiff's claim is barred as this Defendant is entitled to statutory and/or governmental immunity under Florida law." Defendant makes conclusory statements without alleging any facts in support of its defense that it is entitled to statutory and/or governmental immunity under Florida law and fails to identify the statute and/or governmental immunity under

which it seeks protection. Furthermore, section 409.1671 and 409.993, Florida Statutes, set forth their own statutory scheme for protections and limits of liability for lead community-based providers such as the Defendant and specifically address the issue of liability, making it clear that the Defendant, a private community based provider, is not an agent of the state and not entitled to statutory and/or governmental immunity under Florida law. To the extent this defense is duplicative of Defendant's Second and Sixteenth Affirmative Defenses, this defense is denied.

4. Plaintiff denies Defendant's Fourth Affirmative Defense and further avoids this affirmative defense in that the Defendant fails to set forth sufficient ultimate facts to support the defense that "it is entitled to [a] setoff for any and all recovery the Plaintiff [sic] may have received for his injuries from other third parties." Whether or not Defendant is entitled to a set-off is controlled by the application of one or more of the following statutes: sections 768.81, 768.31, and/or 768.76, Florida Statutes. Therefore, a setoff is only permitted under Florida law to the limited extent permitted by these provisions. Florida has abolished joint and several liability and now has a comparative fault scheme for recovery in negligence cases wherein the judgment is apportioned against each party liable on the basis of such party's percentage of fault. *Fla. Stat.* § 768.81(3) (2006). The Florida Supreme Court has held that by adopting the comparative fault rule, "the setoff statutes appl[y] only where the liability continue[s] to be joint and several. *Gouty v. Schnepel*, 795 So. 2d 959, 963 (Fla. 2001) (citing *Wells v. Tallahassee Mem'l Reg'l Med. Ctr., Inc.*, 659 So. 2d 249, 252–53 (Fla. 1995)).

> Under section 768.81(3), each defendant is solely responsible for his or her share of noneconomic damages. The setoff provisions, which were enacted before section 768.81, presuppose the existence of multiple defendants jointly liable for the same damages. Consequently, the setoff provisions do not apply to noneconomic damages for which defendants are only severally liable.

Wells v. Tallahassee Mem'l Reg'l Med. Ctr., Inc., 659 So. 2d 249, 252–53 (Fla. 1995). "As long

as a defendant does not pay more than his or her percentage of fault, that defendant is not entitled to contribution from another tortfeasor or entitled to a setoff from a settling defendant." *Gouty v. Schnepel*, 795 So. 2d 959, 964 (Fla. 2001). Moreover, Defendant fails to set forth any ultimate facts to support the defense that Plaintiff received any sum subject to setoff. Finally, if the Defendant is entitled to a setoff, it would only be for past payments made, not future payments the Plaintiff may receive.

5. Plaintiff denies Defendant's Fifth Affirmative Defense and further avoids this affirmative defense in that the statement that "the Plaintiff's claim is barred to the extent that this Defendant is found to be free of any negligent act, error or omission as regards to this suit" is a general denial of negligence and does not constitute an affirmative defense. According to Florida Rule of Civil Procedure 1.110(c), in its answer, a pleader shall state in short and plain terms the pleader's defenses to each claim and shall admit or deny the averments on which the adverse party relies. A party must affirmatively set forth any matter constituting an avoidance or an affirmative defense. Fla. R. Civ. P. 1.110(d). "An affirmative defense is a defense which admits the cause of action, but avoids liability, in whole or in part, by alleging an excuse, justification, or other matter negating or limiting liability." *St. Paul Mercury Ins. Co. v. Coucher*, 837 So. 2d 483, 487 (Fla. 5th DCA 2002). Defendant's Second Affirmative Defense is a conclusory statement which functions as a general denial; as such, this defense is denied.

6. Plaintiff denies Defendant's Sixth Affirmative Defense and further avoids this affirmative defense in that the Defendant fails to set forth sufficient ultimate facts to support the defense that "the Plaintiff fails to state a claim on which relief can be granted as to this Defendant." Florida Rule of Civil Procedure 1.140(b) requires a defendant asserting the defense of failure to state a cause of action to state both the grounds on which the defense is based and the substantial

matters of law intended to be argued "specifically" and with "particularity." Fla. R. Civ. P. 1.140(b). Defendant has stated neither the grounds on which this defense is based nor the substantial matters of law to be argued with particularity and specificity.

7. Plaintiff denies Defendant's Seventh Affirmative Defense and further avoids this affirmative defense in that the Defendant fails to set forth sufficient ultimate facts to support the defense that "the Plaintiff has not satisfied all the conditions precedent before filing suit." While a claim that a condition precedent has been met may be averred generally, a claim that a condition precedent has not been complied with must be stated "specifically and with particularity." Fla. R. Civ. P. 1.120(c). Defendant merely claims that Plaintiff has not satisfied conditions precedent prior to filing suit without specifically identifying what conditions it is referring to, making this defense insufficient. Additionally, this affirmative defense is denied and avoided as duplicative of the Sixteenth Affirmative Defense which states that the Plaintiff "has failed to comply with the notice provisions of Florida Statute § 768.28."

8. Plaintiff denies Defendant's Eighth Affirmative Defense and further avoids this affirmative defense in that the Defendant fails to set forth sufficient ultimate facts to support the defense that "there were unforeseeable and intervening criminal acts which caused the injuries alleged to the minor Plaintiff and therefore recovery against this Defendant is barred." An intervening act only cuts off the liability of a negligent tortfeasor when the intervening act is "***highly unusual, extraordinary, bizarre***, or . . . seems beyond the scope of any fair assessment of the danger created by the defendant's negligence." *Dep't of Transp. v. Anglin*, 505 So. 2d 896, 899 (Fla. 1987) (emphasis added). Moreover, "[a] common law duty is recognized, regardless of intervening criminal conduct, when a person's actions 'create a foreseeable zone of risk posing a general threat of harm to others . . . to ensure that the underlying threatening conduct is carried out

reasonably.'" *Herndon v. Shands Teaching Hosp. & Clinics, Inc.*, 23 So. 3d 802, 803–804 (Fla. 1st DCA 2009) (quoting *United States v. Stevens,* 994 So. 2d 1062, 1067 (Fla. 2008)). "If an intervening cause is foreseeable the original negligent actor may still be held liable." *Gibson v. Avis Rent-A-Car Sys., Inc.*, 386 So. 2d 520, 522 (Fla. 1980). The Florida Supreme Court has held that

> [a]n act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal. . . . [Furthermore] . . . there are two situations where an actor 'is required to anticipate and guard against the intentional, or even criminal, misconduct of others': (1) "where the actor's own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such misconduct, which a reasonable man would take into account," or (2) where the actor is under a special responsibility to the victim.

United States v. Stevens, 994 So. 2d 1062, 1067 (Fla. 2008) (quoting Restatement (Second) of Torts §§ 302–302B (1965)). As alleged in Plaintiff's Complaint, had Defendant exercised reasonable care in monitoring, reviewing and ultimately recommending the licensure and re-licensure of the foster home of Michael McGuigan, Defendant would have known that McGuigan was not fit to be a foster parent, that he has prior arrests, that he had been investigated for lewd and lascivious acts, and that he had lied and made misrepresentations on his foster parent application. As a result of the Defendant's licensure and re-licensure of McGuigan's foster home, Plaintiff was subjected to sexual abuse by McGuigan. As such, any intervening acts that occurred were reasonably foreseeable and would not cut off the liability of the Defendant.

9. Plaintiff denies Defendant's Ninth Affirmative Defense and further avoids this affirmative defense in that the Defendant fails to set forth sufficient ultimate facts to support the defense that "the injuries and/or damages claimed by the Plaintiff was the result of acts or omissions or third persons, parties or entities not under the supervision, care, custody or control of

the Defendant, and therefore, Plaintiff may not recover against the Defendant for said injuries and/or damages." Pursuant to *Nash v. Wells Fargo Guard Service, Inc.*, 678 So. 2d 1262 (Fla. 1996), in order to include a nonparty on the verdict form, the defendant must plead as an affirmative defense the negligence of the nonparty and specifically identify the nonparty. Defendant has failed to identify any nonparty in its Second Affirmative Defense. Further, this defense is duplicative of Defendant's Tenth, Eleventh, Twelfth and Thirteenth Affirmative Defenses, and as such, is denied and avoided.

10. Plaintiff denies Defendant's Tenth, Eleventh, Twelfth and Thirteenth Affirmative Defenses and further avoids these affirmative defenses in that the Defendant fails to set forth sufficient ultimate facts to support the defenses that:

> this Defendant states that the Plaintiff's damages shall be reduced by the comparative fault of third parties not related to this Defendant, and to the extent this Defendant may be found at fault, which fault is specifically denied, this Defendant is entitled to an apportionment of damages, if any, in accordance with Fla. Stat. Sec. 768.81. Such additional third parties may include but are not limited to: the named Co-Defendants to this cause, as well as such other parties that may be identified though the course and scope of discovery.
>
> in the event the Co-Defendants are dismissed from this case prior to trial, therefore, becoming a non-party, this Defendant, pursuant to Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993), and Fla.Stat.Ch. 768, specifically identifies the following as Fabre Defendant, to wit—MICHEAEL MCGUIGAN. This Defendant will ask this Court to include this party or non-party on the jury verdict form for apportionment of liability consistent with the evidence. This Defendant reserves the right to amend this defense if discovery in this case leads it to conclude additional non-parties should be listed as Fabre Defendants.
>
> in the event the Co-Defendants are dismissed from this case prior to trial, therefore, becoming a non-party, this Defendant, pursuant to Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993), and Fla.Stat.Ch. 768, specifically identifies the following as Fabre Defendant, to wit—KIDS IN DISTRESS, INC. This Defendant will ask this Court to include this party or non-party on the jury verdict form for apportionment of liability consistent with the evidence. This Defendant reserves the right to amend this defense if discovery in this case leads it to conclude additional non-parties should be listed as Fabre Defendants.

> this Defendant, pursuant to Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993), and Fla.Stat.Ch. 768, specifically identifies the following as Fabre Defendant, to wit—DEPARTMENT OF CHILDREN AND FAMILY SERVICES. This Defendant will ask this Court to include this non-party on the jury verdict form for apportionment of liability consistent with the evidence. This Defendant reserves the right to amend this defense if discovery in this case leads it to conclude additional non-parties should be listed as Fabre Defendants.

Pursuant to *Fla. Stat.* §768.81(3) and *Nash v. Wells Fargo Guard Service, Inc.*, 678 So. 2d 1262 (Fla. 1996), the defendant must plead as an affirmative defense [1] the negligence of the non-party and [2] specifically identify the non-party." Moreover, the conduct which allegedly was negligent must be pled with allegations of ultimate facts. *See id.* A bare bones conclusion that the non-party was negligent in some unexplained way does not suffice. Defendant should be required to not only specifically identify *all Fabre* parties, but also identify with particularity the specific negligent actions and omissions by those parties in advance of some reasonable time period prior to the deadline to complete *all* discovery in this matter to avoid undue prejudice to the Plaintiff in preparing to meet this defense. Otherwise, the defense should be later stricken and Defendant should be precluded from asserting the defense of section 768.81, Florida Statutes, as to any person who has not been identified or whose conduct has not been identified in this affirmative defense. Because the Defendant has failed to identify any parties or non-parties it claims were negligent in its Tenth Affirmative Defense, and how those parties or non-parties were negligent in its Tenth, Eleventh, Twelfth and Thirteenth Affirmative Defenses, and to the extent these defenses are duplicative of Defendant's Ninth Affirmative Defense, these defenses are denied. In addition, the issue of whether or not any of the Defendants are jointly or severally liable is controlled by Florida Statute 768.81(3), for if applicable, and as to whether there is joint liability for economic damages, or a set-off because of a settlement, Florida Statute 768.31 or Florida Statute 768.041 and *Wells v. Tallahassee Mem. Reg. Med. Ctr., Inc.*, 659 So. 2d 249 (Fla. 1995) controls.

11. Plaintiff denies Defendant's Fourteenth Affirmative Defense and further avoids this affirmative defense in that the Defendant fails to set forth sufficient ultimate facts to support the defense that "if there are any collateral sources it would be entitled to a set off of all sums paid to or on behalf of the minor child." In addition, Plaintiff is entitled to recover damages for losses paid by collateral sources to the extent such collateral sources have a subrogation right. Further, any future damages are incalculable and collateral sources cannot be used to reduce the amount of damages to which Plaintiff is entitled. Whether or not Defendant is entitled to a set-off is controlled by the application of one or more of the following statutes: sections 768.81, 768.31, and/or 768.76, Florida Statutes. Therefore, a setoff is only permitted under Florida law to the limited extent permitted by these provisions. Moreover, Defendant failed to set forth any ultimate facts to support the defense that Plaintiff received any sums subject to setoff. Additionally, if the Defendant is entitled to a setoff for collateral sources, it would only be for past payments made, not future payments the Plaintiff may receive.

12. Plaintiff denies Defendant's Fifteenth Affirmative Defense and further avoids this affirmative defense in that the Defendant fails to set forth sufficient ultimate facts to support the defense that "it is entitled to all of the rights, privileges, immunities afforded by Fla. Stat. Ch. 39 and Fla. Stat. Sec. 409.993 and all subsections there under. This Defendant further and specifically relies on the limitation of liability contained within the statutory provision which limits its total liability to all claimants resulting from the matter referenced in Plaintiff's Complaint." Defendant makes conclusory statements without alleging any facts in support of its defenses that it is entitled to immunity.

The Defendant misinterprets the statute and confuses what the statute requires in insurance coverage with a statutory cap on damages. Section 409.1671 requires community-based providers

to "obtain a minimum of $1 million per *claim*/$3 million per *incident* in general liability insurance coverage" as part of their contract. *Fla. Stat.* § 409.1671(1)(j). In 2014, section 409.1671 was repealed and the limits of liability are now found in section 409.993. Section 409.993 requires community-based providers to "obtain a minimum of $1 million per occurrence with a policy period aggregate limit of $3 million in general liability insurance coverage." *Fla. Stat.* § 409.993(3)(a). This is not a cap on damages; it is just a minimum that subcontracted community-based providers must maintain in coverage. Section 409.1671 states that "in any tort action brought against such an eligible lead community-based provider, noneconomic damages shall be limited to $200,000 per claim" and section 409.993 states that "noneconomic damages shall be limited to $400,000 per claim;" however, they go on to explicitly state that "[a] ***claims bill*** may be brought on behalf of a claimant pursuant to s. 768.28 ***for any amount exceeding the limits specified in this paragraph***." *Fla. Stat.* § 409.1671(1)(j) (2013), § 409.993(3)(a) (2014) (emphasis added). Moreover, the statutes provide that "[t]he Legislature is cognizant of the increasing costs of goods and services each year and recognizes that fixing a set amount of compensation actually has the effect of a reduction in compensation each year. Accordingly, the conditional limitations on damages in this section shall be increased at the rate of 5 percent each year, prorated from the effective date of this paragraph" in section 409.1671 and "prorated from July 1, 2014" in section 409.993, "to the date at which damages subject to such limitations are awarded by final judgment or settlement." *See Fla. Stat.* § 409.1671(1)(l) (2013); § 409.993(4) (2014).

Furthermore, pursuant to sections 409.1671 and 409.993, said limits on liability "shall not be applicable to a provider or an employee who acts in a culpably negligent manner or with willful and wanton disregard or unprovoked physical aggression when such acts result in injury . . . or such acts proximately cause such injury." As alleged in the Complaint, the Defendant failed to

oversee, monitor and review KID's licensing study and background screening of McGuigan and as a result, failed to discover his drug abuse history, criminal history, history of his investigations for lewd and lascivious acts on minor children, and cohabitation with another individual for ten years who committed suicide shortly after their relationship ended, all of which would have immediately alerted the Defendant that McGuigan lied on his application, was a danger to children, was not of good moral character, and should be disqualified from becoming a foster parent. Despite these red flags, and despite the fact another foster child, Gabriel Myers, committed suicide less than a month after he was removed from McGuigan's home, the Defendant approved and continued to recommend the licensure and re-licensure of McGuigan's home year after year. As a result of the Defendant's willful and wanton actions, which enabled McGuigan to remain licensed as a foster parent and subsequently act as a foster parent to the Plaintiff, the Plaintiff was sexually abused by McGuigan, which resulted in the minor child becoming emotionally harmed and sexually reactive. Defendant's repeated acts were conducted with willful and wanton disregard for the safety of the the Plaintiff, eliminating any statutory cap created by section 409.993. Further, to the extent Defendant seeks the protection of immunities protected by Florida Statute, Chapter 39, Defendant has failed to specifically identify the statutes under which Defendant seeks immunity.

13. Plaintiff denies Defendant's Sixteenth Affirmative Defense and further avoids this affirmative defense in that the Defendant fails to set forth sufficient ultimate facts to support the defense that "it is entitled to all of the rights, privileges, immunity and limitations ordered by Florida Statute §768.28 and all subsections there under. The Defendant further specifically relies on the limitation of liability of $200,000.00 per claimant and $400,000.00 per occurrence contained in the statutory provision which limits its total liability to all claimants resulting from

the incident referenced in Plaintiff's complaint. Further, the Plaintiff has failed to comply with the notice provisions of Florida Statute §768.28." The Defendant's contract clearly states that the Defendant is an independent contractor and not an agent of the state, and is therefore not entitled to the protections of section 768.28. Furthermore, section 409.1671 and 409.993, Florida Statutes, sets forth their own statutory scheme for protections and limits of liability for lead community-based providers such as the Defendant and specifically addresses the issue of liability, making it clear that the Defendant is not an agent of the Department and not entitled to the protections of section 768.28, Florida Statutes, including pre-suit notice. Further, this defense is denied and avoided to the extent it is duplicative of Defendant's Second, Third, and Seventh Affirmative Defenses.

14. Plaintiff denies Defendant's Seventeenth Affirmative Defense and further avoids this affirmative defense in that the Defendant fails to set forth sufficient ultimate facts to support the defense that "the Plaintiff's cause of action is barred by the statute of limitations."

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the above and foregoing has been provided via electronic delivery to: CONSTANTINE G. NICKAS, ESQUIRE and BRYAN B. WALTON, ESQUIRE, Wicker, Smith, O'Hara, McCoy & Ford, Attorneys for Defendant, Kids in Distress, Inc., miacrtpleadings@wickersmith.com; aloynaz@wickersmith.com; lgarcia@wickersmith.com; scortes@wickersmith.com, RENEE GOMEZ, ESQ., and MARITZA PENA, Marlow, Adler, Abrams, Newman and Lewis, Attorneys for ChildNet, Inc., rgomez@marlowadler.com and mpena@marlowadler.com and MICHAEL MCGUIGAN, Defendant, 43 Lakewood Drive, Pittsfield, MA 01201, jmm074662@gmail.com, this 5th day of August, 2015.

TALENFELD LAW
1776 N. Pine Island Road
Suite 222
Fort Lauderdale, FL 33322
Telephone: (754) 888-KIDS
Facsimile: (954)644-4848

s/ Rayni A. Rabinovitz
HOWARD M. TALENFELD
Fla. Bar No. 312398
RAYNI A. RABINOVITZ
Fla. Bar No. 106162
Howard@justiceforkids.us
Rayni@justiceforkids.us
Erica@justiceforkids.us